

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.2.2010

C O R A M :

THE HONOURABLE MR.H.L.GOKHALE, THE CHIEF JUSTICE  
AND  
THE HONOURABLE MR.JUSTICE K.K. SASIDHARAN

W.A.No.1778 of 2009  
& M.P.Nos.1 and 2 of 2009

Red Bull India Pvt., Ltd.,  
rep.b y Authorised Representative  
A company incorporated under the India  
Companies Act, 1956  
Regd. Off:RFI, Kakad Chambers Annex  
132, Dr.Annie Besant Road  
Worli, Mumbai-400 018

... Appellant

-vs-

1. The Office of the Commissioner of Customs  
through the Joint Commissioner of Customs  
Custom House  
No.60, Rajaji Salai  
Chennai-600 001.

2.The Central Food Laboratory  
Mysore, through its Director  
Mysore-570 020.

3.The Port Health Organisation  
through the Port Health Officer  
60, Rajaji Salai  
Chennai-600 001.

... Respondents

PRAYER: Writ Appeal filed under Clause 15 of Letter Patent against the order dated 18 November, 2009 in W.P.No.17507 of 2009 on the file of this court. Writ Petition has been filed under Article 226 of the constitution of India for the issuance a writ of Certiorarified Mandamus to call for the records leading to the Certificate of Analysis 2051P/PFA/2009 13.8.2009 issued by the 2nd respondent and to quash the same as illegal and arbitrary and direct the respondent to have the petitioners product tested purely as a Proprietary Food and direct the respondents to take further steps in the matter for release the petitioners goods based on such report.

For Appellant : Mr.C.A.Sundaram,  
Senior Counsel  
for Mr.S.Sethuramn

For respondents : Mr.M.Ravindran  
Additional Solicitor General of India  
Assisted by Mr.C.Kanagaraj for R2  
and Ms.P.Bhuvaneshwari, SCCG

## J U D G M E N T

K.K.SASIDHARAN, J

The applicability of the Regulatory Provisions specified in the Prevention of Food Adulteration Rules and Appendixes under Rule 37-A(2)(b) in respect of "Proprietary Food" is the moot question to be decided in this writ appeal.

2. The appellant challenges the order passed by the learned Single Judge dated 18 November, 2009 in W.P.No.17507 of 2009 whereby and whereunder the request of the petitioner to quash the Analysis Report issued by the Central Food Laboratory, Mysore and to test the Energy Drink of the appellant as a "Proprietary Food" was rejected.

3. The facts, giving rise to the present appeal, may be summarised thus:

(a) The appellant is a company registered under the Companies Act, 1956. It is a wholly owned subsidiary of the Red Bull GMBH, a company incorporated under the laws of Austria. The appellant is the manufacturer of Red Bull Energy Drink, a world renowned energy drink sold globally. The appellant imports Red Bull Energy Drink and sells the same in India.

(b) The appellant earlier filed a Writ Petition in W.P.No.17805 of 2005 challenging the Certificate of Analysis dated 10 January, 2005 issued by the Central Food Laboratory and prayed for a direction to test the Energy Drink purely as a "Proprietary Food". The said writ petition was dismissed by a learned Single Judge. When the matter was taken up in Writ Appeal in W.A.No.2206 of 2005, the Division Bench opined that the energy drink of the appellant was purely a proprietary food. Accordingly, the energy drink was tested as a proprietary food and ultimately the consignment was released.

(c) While the matters stood thus, the energy drink imported by the appellant on 22 June, 2009 was once again detained by the Customs Department at Chennai and the sample was sent for analysis. The appellant came to know that the sample was tested by the Central Food

Laboratory, Mysore and they have given a report that the energy drink does not conform to the standards prescribed under the Prevention of Food Adulteration Act (hereinafter referred to as "PFA Act"). According to the appellant, the product is purely a proprietary food and as such the Central Food Laboratory erred in treating it as a standardised food.

(d) The Central Food Laboratory placed reliance on the amendment made to the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as "PFA Rules") and more particularly Rule 37-A(2)(b) and tested the sample in accordance with the standards prescribed for other products which are not proprietary and as such, the very basis adopted by the Central Food Laboratory was incorrect.

4. The second respondent filed a counter affidavit wherein it was contended that the proprietary food imported by the appellant contained carbon-di-oxide as one of the ingredients, as evident from the label itself and as such, the product was nothing but carbonated beverage. Therefore, such non-alcoholic carbonated beverage has to be tested as per clause A.01.01 of Appendix B of the PFA Rules. There was an amendment to Rule 37-A(2) of the PFA Rules as per G.S.R. 664(E) dated 19 September, 2008 whereby and whereunder even the proprietary foods were expected to conform to the standards prescribed under various Appendixes to the PFA Act and Rules. Accordingly, the Central Food Laboratory justified the report of analysis.

5. The learned Single Judge found that the appellant earlier filed a writ petition before the High Court of Bombay and it was dismissed on the ground that the appellant has to approach the concerned authorities. According to the learned Single Judge, when there was a direction by the Bombay High Court in the very same subject matter, it was not proper on the part of the appellant to approach this Court with the very same plea. Accordingly, the writ petition was dismissed. Aggrieved by the said order, the appellant is before us.

SUBMISSIONS:-

6. The learned Senior Counsel for the appellant would contend thus:-

(a) It is true that there was an amendment to Rule 37-A(2) of the PFA Rules, 1955 as per G.S.R.664(E) dated 19 September, 2008. The amended rule provides that the proprietary food shall comply with all other regulatory provisions specified in PFA Rules and in Appendixes. This shows that even the proprietary food should conform to the regulatory provisions of the PFA Act and the Rules made thereunder. The regulatory provisions pertain to the necessity to take licences, provision to give warranty, disclosure of the name of



the vendor or the person from whom the article of food was purchased. It was not the intention to give an extended meaning to the term "Regulatory" so as to include standards of quality also under the umbrella. Therefore, the Central Food Laboratory committed a basic error in treating the food as a proprietary one testing the same in accordance with the standards of quality prescribed under the provisions of the PFA Rules read with relevant Appendixes.

(b) The Director General of Foreign Trade, New Delhi issued a certificate dated 25 April, 2003 classifying the energy drink of the appellant as per Code No.2202-9090. The said classification relates to "others" and therefore, it is evident that the classifications relating to "Mineral Water" and "Aerated Water" are not applicable to the product imported by the appellant. When the Director General of Foreign Trade has clearly classified the item as "proprietary food", it was not open to the Analysis Wing to test the food as a standardised one under the Appendixes to the PFA Act.

(c) The learned Single Judge was carried away by the earlier writ petition filed by the appellant before the Bombay High Court and the dismissal of the same and as such was of the view that the appellant is not entitled to file another writ petition before this Court for the very same relief. The writ petition filed by the appellant before the High Court was dismissed only on the ground of alternative remedy. The High Court has not examined the merits or legality of the contentions raised in the matter. Therefore, there was nothing wrong in filing another writ petition before this Court, and that too when the Customs Authorities detained the product on the basis of the Analysis Report issued by the Central Food Laboratory.

7. The learned Additional Solicitor General appearing for the respondents would contend thus:-

(a) The writ petition filed by the appellant on the basis of an inter departmental communication is not maintainable. The test report was not addressed to the appellant. The entire matter is at large before the Commissioner of Customs and it is for the said authority to accept or reject the report submitted by the Central Food Laboratory, Mysore. Therefore the writ petition was pre-mature and in fact it was filed even before issuing the show-cause notice to the appellant. Therefore the appellant is not entitled to maintain the writ petition.

(b) The Prevention of Food Adulteration Act was amended periodically and as per G.S.R.664(E) dated 19 September, 2008, Rule 37-A(2) was amended and a new clause was inserted, whereby and whereunder, it was stipulated that even the proprietary food shall comply with all other regulatory provisions specified under the Rules as well as in the Appendixes to the PFA Act. The Appendixes contains various regulatory provisions which are in the nature of standards

and as such the energy drink imported by the appellant should conform to those standards.

STATUTORY PROVISIONS:-

8. Section 5 of the PFA Act prohibits import of certain articles of food into India. Section 5(iv) specifically prohibits import of any article of food in contravention of any other provisions of the PFA Act or the Rules made thereunder. Section 6(i) deals with application of law relating to sea customs and powers of Customs officers. Section 6(2) gives power to the Customs Authorities to detain any article of food imported, which is prohibited under Section 5 and to forward the sample to the Public Health Laboratory for testing. Rule 5 provides for fixing standards of quality of the various articles of food specified in Appendixes B,C and D to the Rules.

9. Rule 37-A reads thus:-

Manufacture of proprietary food:-

(1) Proprietary food means a food which has not been standardized under the Prevention of Food Adulteration Rules, 1955.

[(2) In addition to the provisions including labelling requirements specified under these rules, the proprietary foods shall also conform to the following requirements, namely:-

(a) the name of the food and category under which it falls in these rules shall be mentioned on the label;

(b) the proprietary food product shall comply with all other regulatory provisions specified in these rules and in Appendixes.]  
(emphasis supplied)

10. The Core question to be decided in this writ appeal is as to whether the "Proprietary Food" within the meaning of Rule 37-A should conform to the standards of quality as provided in the Rules as well as in the Appendixes to the PFA Rules, 1955, in respect of certain ingredients.

11. The learned Additional Solicitor General contended that the very writ petition was not maintainable inasmuch as no show cause notice was issued by the Customs Authorities and the document under challenge was only an inter-departmental communication. It is true that the Customs Authorities have not issued show cause notice to the

appellant. However they have forwarded the sample to the Central Food Laboratory as provided under Rule 6(2) of the PFA Act, 1954. If it is held by this laboratory that the sample drawn does not conform to the standards of quality, the Commissioner of Customs has no other alternative than to confiscate the consignment and to take follow up action as per law. The very basis for initiating action against the importer is the report of the Director of Central Food Laboratory. The said report is binding on the Customs Authorities and even if the Customs Authorities entertained a different view in the matter, it was not possible for them to substitute their opinion in the place of the opinion furnished by the Central Food Laboratory. Therefore, in the face of Sections 5 and 6 of the PFA Act, 1954 it cannot be said that the writ petition is not maintainable. Everything depends upon the impugned analysis report. Therefore we are not in a position to agree with the contention of the learned Additional Solicitor General with respect to the preliminary point raised by him.

DISCUSSION:-

12. The amendment to Rule 37-A(2) was introduced as per G.S.R.No.664(E) dated 19 September, 2008 and it was only as per the said amendment the regulatory provisions specified in the PFA Rules as well as in the Appendixes were made applicable even to the proprietary food.

13. The amendment as per G.S.R.664 dated 19 September, 2008 appears to have made far reaching changes in the matter of standards of quality and its coverage as well as its applicability. After the amendment, the contents of the product should conform to the standards prescribed for such ingredients under the PFA Act and the Rules made thereunder, including the Appendixes. The logical conclusion is that even though the product as such was not standardised, standards of quality prescribed for the ingredients of those food items should meet the standard.

14. The learned Senior Counsel fairly conceded that the Energy Drink of the appellant was only a carbonated water impregnated with carbon-di-oxide. Even in the earlier round of litigation before the Bombay High Court, the appellant has clearly admitted that the beverage was nothing but "Carbonated Water".

15. Appendix B and more particularly clause A.01.01 defines "Carbonated Water" as water conforming to the standards prescribed for Packaged Drinking Water under the PFA Rules, 1955 impregnated with carbon-dioxide under pressure and contains any of the ingredients singly or in combination as indicated therein.

16. Clause A.01.01 contains various ingredients and with respect to "caffeine" there was a stipulation that it should not exceed 145 parts per million. The test conducted by the Central Food



Laboratory, Mysore, shows that Caffeine content in the beverage of the appellant was about 329 PPM and as such, the laboratory declared that it was higher than the prescribed limit of 145 PPM as per G.S.R.No.451 (E) dated 19 June, 2009.

17. The learned Senior Counsel contended that Rule 37-A(2)(b) deals with only regulatory provisions in the nature of licences and other prescriptions and it has nothing to do with standards of quality. Though at first blush the contention appears to be very attractive, a careful reading of the various regulatory measures in the Appendixes, which are in the nature of standards, would make it clear that the legislature has intended only standards, when it refers to regulatory provisions in relation to appendixes. Appendix A contains only statutory forms. On the other hand, Appendixes B to D contains only standards. Rule 37-A(2) as stood prior to 19 March, 2009 contains a stipulation that proprietary food product shall not contain food additives except as provided in the Rules for that food and/or category of food. Therefore even as per the earlier provision, the proprietary food should conform to certain standards with respect to food additives. By way of subsequent amendment, the coverage of the regulatory provision was extended to the other ingredients of the proprietary food in case such ingredients contain a particular standard as per the relevant entry in the appendixes.

18. There are other provisions also in the PFA Rules which gives an indication that "Regulation" within the meaning of PFA Act was not merely police powers. Part VIII of the Rules captioned "Prohibition and Regulations of Sales" contains regulations which are in the nature of standards of quality. For instance Rule 44(a) provides that no person shall sell cream which has not been prepared exclusively from milk or which contains less than 25 per cent of milk fat.

19. There is a specific provision in the Rules dealing with licences. Part IX of the Rules contains various conditions for sale and licences. Therefore the term "Regulatory" as used in Rule 37(2)(b) cannot be given a restricted meaning, confining to licences alone.

20. While interpreting the provisions of an enactment like PFA Act, the mischief it seeks to avoid should be taken note of. The PFA Act was enacted with the laudable object to prevent food adulteration. Section 2(i)(a) defines adulterated food. Section 2(m) provides that if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, it is deemed to be adulterated.

21. In the subject case, admittedly the Energy Drink imported by the appellant contains "caffeine". As per clause A.01.01 caffeine content should be less than 145 PPM in carbonated water. The test

report clearly shows that caffeine content was above the specified standard. Therefore, the second respondent was perfectly correct in their finding that the product does not conform to the standards prescribed under the Appendixes to the PFA Rules.

22. The term "Regulatory Provisions" was used with a specific purpose. It covers the entire mandatory provisions including those provisions relating to standards of quality.

23. Black's Law Dictionary defines "Regulate", as "to adopt measures to promote its growth and insure its safety."

24. The Supreme Court in K. Ramanathan v. State of T.N., (1985) 2 SCC 116, considered the scope and ambit of the term "Regulation" and observed thus:

18. The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. ....

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the



context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."

25. In K. Ramanathan case (1985) 2 SCC 116, the Supreme Court indicated the different shades of meaning given to the term "Regulate" in Corpus Juris Secundum, Vol.76. It reads thus:

"'Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict."

26. In U.P. Coop. Cane Unions Federations v. West U.P. Sugar Mills Assn., (2004) 5 SCC 430, Constitution Bench of the Supreme Court indicated that the word "Regulation" has no fixed connotation and its meaning differs according to the nature of the thing to which it is applied. The observation reads thus:-

"20. .... "Regulate" means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

27. The PFA Act is admittedly a legislation made in larger public interest, as it aims to safeguard the standards in respect of food items. When the statute uses the word "regulation" it has to be given a purposive interpretation taking into account the object of the Act. Therefore the "regulation" as used in Rule 37(2)(b) has to be construed to mean regulation in respect of standards of quality also.

28. The sample was tested by the Central Food Laboratory in accordance with the standards prescribed under the PFA Act and the Rules made thereunder. The laboratory was expected to test the sample in accordance with the prevailing standards. Therefore it was not open to the appellant to insist that the testing should be conducted by treating the food as proprietary, unmindful of the statutory amendments made subsequently, prescribing specific

standards for the ingredients, even in respect of proprietary foods. The statutory authorities are vested with powers to change the standards from time to time. The standards cannot be static. It has to be varied from time to time on account of various factors including scientific test. Since it is a food item, the degree of standards and the applicability of the same to a particular product are matters to be left to the authorities, who are well-versed in the subject. The courts have no expertise to decide the standards of quality. When the amendment clearly indicates that even the proprietary food has to comply with certain standards in respect of ingredients contained in the food, no other interpretation could be given to the word "regulation". The Legislature was more careful in using the word "Appendixes" instead of "Appendix". It is clear from the "Appendixes" that it also contains standards of quality in addition to the regulations relating to licences.

29. The contention of the learned Senior Counsel for the appellant that the energy drink in question was a "proprietary food" was mainly on account of the Certificate issued by the Director General of Foreign Trade. The certificate dated 25 April, 2003 issued by the Director General of Foreign Trade was for the limited purpose of importing the energy drink to India. The said certificate was issued to the appellant on the basis of the letter submitted by them along with a certificate issued by a private agency. The Director General of Foreign Trade in the very order has stated that the classification was subject to the laws and rules of the Government and production of a certificate from the competent health authority of the country of export. There was also a clear indication in the order that the certificate furnished by the appellant regarding non-alcoholic and fitness for human consumption was not from the Government Agency of the country of its manufacture. Therefore, clearance given by the Director General of Foreign Trade and the classification made by him in respect of the energy drink of the appellant was subject to the condition that the requisite certificate from the competent health authority has to be obtained to ensure compliance. The Director General of Foreign Trade had no occasion to test the sample as it was prior to import. The certificate of import was given subject to other "Laws and Rules of the Government", which necessarily involves the PFA Act also. The classification of the energy drink has nothing to do with the PFA Act. It was altogether for a different purpose. Therefore the certificate of the Director General of Foreign Trade would be of no help to the appellant to claim that their product would come under the classification "Others" as per entry 2202-9090, termed as "proprietary" and not under the classification "Aerated Water."

30. The learned Senior Counsel for the appellant placed reliance on the judgment of the Supreme Court in Hindustan Lever and Food Inspector and another (2004(13) SCC 83) and contended that the standards applicable to non-proprietary foods cannot be applied to

"proprietary food".

In Hindustan Lever case, the sample drawn was only instant milk powder, which contained skimmed milk powder in part. It was tested in accordance with the standard prescribed for skimmed milk product. It was only in such circumstances, the Supreme Court observed that any prosecution in regard to an article for which no standards have been laid, applying the standards for other articles would not be sustainable.

The position in the present case is entirely different in view of the subsequent amendment made to Rule 37-A (2), which contains a clear indication that even proprietary food should conform to the Regulatory provisions as found in the rules and Appendixes.

TO CONCLUDE:-

31. The Analysis report of the second respondent clearly shows that the energy drink imported by the appellant does not conform to the standards prescribed under PFA Act and the Rules made thereunder. The report was based on Rule 37-A(2) of the Rules read with Clause A.01.01 of Appendix B. In such circumstances, the appellant has not made out a case for a fresh analysis, treating the drink purely as "proprietary food".

32. Therefore we are of the view that there is no merit in the contentions raised on behalf of the appellant.

33. In the result, the writ appeal is dismissed. Consequently, the connected Mps are closed. No costs.

Sd/-  
Asst. Registrar

//true copy//

सत्यमेव जयते  
Sub Asst.Registrar

Tr/

To

1. The Office of the Commissioner of Customs  
through the Joint Commissioner of Customs  
Custom House  
No.60, Rajaji Salai  
Chennai-600 001.

WEB COPY



2.The Director,  
Central Food Laboratory  
Mysore, Mysore-570 020.

3.The Port Health Officer  
Port Health Organisation  
60, Rajaji Salai  
Chennai-600 001.

1 cc to M/s.P.Buvaneswari, Advocate, Sr.No.13146

1 cc to M/s.C.Kanagaraj Associates, Advocate, Sr.No.13106

1 cc to Mr.S.Sethuraman, Advocate, Sr.No.13096

W.A.No.1778 of 2009  
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